

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS



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The Honorable Phyllis Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2524
Washington, D.C. 20210

Re: Proposed Rule on Filings Required of Multiple Employer Welfare
Arrangements and Certain Other Related Entities [RIN 1210-AB51]

Dear Ms. Borzi:

The National Coordinating Committee for Multiemployer Plans (the NCCMP) appreciated the opportunity to submit these comments on the Proposed Rule on Filings Required of Multiple Employer Welfare Arrangements and Certain Other Related Entities, published by the Department of Labor (Department), on December 6, 2011.

As you know, the NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately 26 million workers, retirees, and their families who rely on multiemployer plans for health and other benefits. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit, non-partisan organization, with members, plans, and plan sponsors in every major segment of the multiemployer plan universe.

The proposed rule amends the existing reporting requirements to incorporate provisions enacted as part of the Patient Protection and Affordable Care Act (PPACA). The Preamble to the proposed rule states that these new provisions were intended to more clearly address the reporting obligations of MEWAs that are ERISA plans. The Preamble also states that the proposed rule is designed to impose the minimal amount of burden on legally compliant MEWAs and entities claiming exception (ECEs) while implementing the Secretary's authority to take enforcement action against fraudulent or abusive MEWAs to protect health benefits for businesses and their employees.

The multiemployer community supports these efforts of the Department to prevent fraud and abuse by MEWAs. The distinction between MEWAs and multiemployer plans which was the subject of negotiated rule-making many years ago is an important one to maintain and has not

been amended by the ACA. However, the changes in the reporting requirements for Entities Claiming Exception (ECEs), which will include many if not predominantly legitimate multiemployer health benefit plans, are confusing and are structured in such a way that it is not practically possible for most legitimate multiemployer health plans to satisfy the timing requirement. This will subject the multiemployer plan-ECE to substantial penalties. One of the new origination events also appears to be circular in its presentation in the regulations. Perhaps this is an error. In these comments, we point out these problems and offer to work with the Department to seek solutions.

In the past, the reporting requirements have had only a modest impact on multiemployer plans as ECEs.¹ Currently, the administrator of a multiemployer plan-ECE must file Form M-1 if the multiemployer plan-ECE was last “originated” at any time within three (3) years before the annual filing due date for this Form. A Form M-1 must also be filed within 90 days after an “origination” unless the origination took place in October, November, or December of any year. A one-time 60-day extension of time to file will automatically be granted if the administrator of the multiemployer plan-ECE requests an extension.

Three (3) events currently constitute an “origination” for a multiemployer plan-ECE and the Instructions to the current Form M-1 provide that a multiemployer plan-ECE may be originated more than once.² These three (3) current origination events are when (i) the multiemployer plan-ECE first begins offering or providing coverage for medical care to the employees of two or more employers (including one or more self-employed individuals); (ii) the multiemployer plan-ECE begins offering or providing such coverage after a merger of multiemployer plan-ECEs (unless all multiemployer plan-ECEs involved in the merger were last originated at least three (3) years prior to the merger); or (iii) the number of employees to which the multiemployer plan-ECE provides coverage for medical care is at least 50% greater than the number of such employees on the last day of the previous calendar year (unless such increase is due to a merger with another multiemployer plan-ECE under which all multiemployer plan-ECEs that participate in the merger were last originated at least three (3) years prior to the merger).

The proposed rules add two additional origination events, significantly reduce the time for filing the Form M-1 after an origination (with notifications after the event) and provide for notifications before certain origination events. As noted above, the structure of multiemployer plans will make it extremely difficult and in some circumstances impossible to meet the timing requirements of certain notifications. The continued availability of the automatic 60-day extension will not solve this problem in most cases because the multiemployer plan may not know that an origination event has occurred and so will be unable to seek an extension.

The proposed rule provides the following origination events and notice requirements for that origination event:

¹ An Entity Claiming Exception (ECE) is specifically defined as “an entity that claims it is not a MEWA on the basis that the entity is established or maintained pursuant to one or more agreements that the Secretary finds to be collective bargaining agreements within the meaning of section 3(40)(A)(i) of ERISA and §2510.3-40.”

² The M-1 filing requirement also applies to MEWAs but we believe that the issues that are the subject of these comments are unique to the structure of multiemployer plans.

Origination Event	Notice
The multiemployer plan-ECE begins operating with regard to employees of two or more employers	30 days <u>before</u> the origination date
The multiemployer plan-ECE begins operating in any additional state while required to report within the 3 years following another origination. Requires clarification. May include an error. ³	30 days <u>before</u> the origination date
The multiemployer plan-ECE begins operating following a merger with another multiemployer plan-ECE unless all of the ECEs in the merger were last originated at least three (3) years prior to the merger.	30 days <u>after</u> the origination date
The number of employees receiving coverage for medical care under the multiemployer plan-ECE is at least 50% greater than the number of such employees on the last day of the previous calendar year unless the increase is due to a merger that is not itself an origination event (see above).	30 days <u>after</u> the origination date
The multiemployer plan-ECE during the three (3) year period following an event described above, experiences a material change as defined in the Form M-1 Instructions. ⁴	30 days <u>after</u> the origination date

We are concerned primarily with the notification required *before* a multiemployer plan-ECE begins operating in an additional state. First, there is no statutory authority to require multiemployer plan-ECEs to report in advance of operating in an additional state. The Preamble to the proposed regulation establishes this in the history of the legislation on which the regulation is based. Reporting was first required for MEWAs (and ECEs) pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) which amended ERISA to add section 101(g) to ERISA, 29 U.S.C.1021(g), providing the Secretary with the authority to require, by regulation, annual reporting by MEWAs that are not ERISA-covered plans. Section 6606 of the Patient Protection and Affordable Care Act (Affordable Care Act) subsequently amended section

³ The period during which this notification is required is unclear in the proposed rule because of a circular reference that may contain an error. See §2520.101-2(b)(9)(ii) and §2520.101(c)(1)(ii).

⁴ M-1 Instructions state as follows: “**Material Change:** Any information reported on this Form M-1 in response to custodial and financial information located in Part II that is different from information reported by the MEWA or ECE in its most recently filed Form M-1 is considered a material change and requires the MEWA or ECE to submit a new Registration or Origination filing. Note, ECEs must only file when a material change occurs during the three-year filing period and that change will not restart the calculation of that period.” This information includes the identification of many service providers.

101(g) of ERISA to require that such MEWAs register with the Department prior to operating in a State. This amendment also excluded ERISA-covered group health plans. Specifically, 101(g), as amended, provides that multiple employer welfare arrangements providing benefits consisting of medical care (within the meaning of section 733(a)(2) of ERISA, 29 U.S.C. 1191b(a)(2)) which are not ERISA-covered group health plans must register with the Secretary prior to operating in a State. The Secretary may also, by regulation, direct such multiple employer welfare arrangements to report, not more frequently than annually, in such form and such manner as the Secretary specifies for the purpose of determining the extent to which the requirements of part 7 of subtitle B of title I of ERISA are being carried out in connection with such benefits.

Second, this notification requirement itself is somewhat circular in the text of the regulation and may include an error. Section 2520.101-2(b)(9)(ii) provides that an origination occurs if the multiemployer plan-ECE begins operating in any additional State while required to report pursuant to paragraph (c)(1)(ii) of this section. Section 2520.101(c)(1)(ii) in turn provides that the administrator of a multiemployer plan-ECE is required to report during the three (3) year period following an origination event described in §2520.101-2(b)(9)(i)-(iv). So a multiemployer plan-ECE that begins operating in an additional state has an origination if this event occurs while it is required to report for the three (3) year period following when it begins operating in an additional state (as well as following other events). This requires clarification. Read literally, a multiemployer plan-ECE would never be required to report no matter how far it expanded geographically so long as it had no other origination events.⁵ This seems unlikely to be the intent, however, given the stated purpose of these reporting requirements.

Finally, to the extent that the regulation provides or is intended to provide that a multiemployer plan-ECE must report 30 days in advance of when the plan begins “operating” in an additional state, most multiemployer plans will be unable to comply with this notice requirement simply because they will not know in advance when the multiemployer plan will begin “operating” in an additional state. This is because the term “operating”, as defined in the regulation for the purpose of this notice is quite vague and very broad. Events that could constitute “operating” under the definition would most likely take place at the participant level or at the level of the bargaining parties of a multiemployer plan-ECE and not as a decision of the multiemployer plan’s Board of Trustees or Administrator. Therefore, it is likely that the plan will learn that it is “operating” in an additional state significantly after the events that constitute “operating” commence. By then the Plan will be late in filing the Form M-1 and subject to significant penalties.

The regulation provides that “operating” means “any activity including but not limited to marketing, soliciting, providing, or offering to provide benefits consisting of medical care.” An example of the vagueness and breadth of this definition may be illustrated by the following example. In a multistate area such as the Washington, DC metropolitan area employees covered by multiemployer plans in industries such as construction or trucking (as well as other industries) will work, live and use medical service providers in various states. Based on the definition of

⁵ Example: ECE operating for 20 years in State A starts operating in State B. No M-1 is due because commencement of operations does not occur during three (3) year period in which ECE is required to file any report. The following year the ECE begins operating in State C. Again no report is due because the commencement of operations does not occur during the three (3) year period in which the ECE is required to file any report. See §2520.101-2(b)(9)(ii) and §2520.101(c)(1)(ii).

“operating” in the Proposed Rule the following actions could constitute “operating”. Nevertheless, the multiemployer plan-ECE would be unlikely to know of any of these actions in advance:

- Participant covered by the plan moves to New State.
- Participant covered by the plan goes to medical service provider in New State.
- Union distributes information about the medical and pension plan as well as wages and training program as part of an organizing drive aimed at employers in New State.
- Union organizes a new company and its employees in New State. Company signs the CBA, the employer contributes and eventually the employees become eligible for medical benefits.
- Company previously signed to CBA bids on and is awarded a job in New State. Many participants covered by the plan work on the job and earn contributions to continue plan eligibility by working in New State.

Any or all of these events could constitute “operating” under the definition in the Proposed Rule but the multiemployer plan-ECE many never learn of some of these events. For example, if a Union’s organizing efforts are not successful the plan may never know that the Union distributed information. A plan may learn of a participant’s address change when the participant notifies the plan. A bill from a service provider in New State will advise the plan of the use of such service provider unless a billing service in another location is used. An employer in Old State that is awarded a job in New State will report the total hours worked but not necessarily the location of the work.

If the multiemployer plan-ECE decides to move to New State or open an additional administrative office in New State the appropriate notice can be provided in advance. Notice may be timely given only for actions that constitute “operating” and that are decided or directed at the plan level. Therefore, the Proposed Rule should be modified to more clearly and narrowly define “operating” and to require advance notice only for actions by the plan and not for actions of participants or the collective bargaining parties. To maintain the current advance notice requirement along with the broad definition of “operating” ignores the structural and operational realities of multiemployer plans.

Conclusion

We appreciate the opportunity to submit comments on these important issues. Please do not hesitate to contact me if you have any questions about our comments or need additional information. We would welcome the opportunity to work with the Department to develop a modified reporting requirement.

Respectfully submitted,



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Executive Director